

CA24N
XC 18
86P62



Standing Committee on Procedural Affairs and Agencies, Boards and Commissions

Report on the Premature Disclosure of the
Interim Report of the
Select Committee on Economic Affairs

Report on the Matter of Privilege relating
to the Premature Release of the
Confidential Draft Material of the
Select Committee on Energy



Digitized by the Internet Archive
in 2022 with funding from
University of Toronto

<https://archive.org/details/31761114667645>



LEGISLATIVE ASSEMBLY
ASSEMBLÉE LÉGISLATIVE

CA20N
XC 18
- 86 P62

The Honourable Hugh Edighoffer, M.P.P.,
Speaker of the Legislative Assembly.

Sir,

Your Standing Committee on Procedural Affairs and Agencies, Boards and Commissions has the honour to present its Report and commends it to the House.

A handwritten signature in dark ink, reading "Michael J. Breagh". The signature is written in a cursive, flowing style.

Michael J. Breagh, M.P.P.
Chairman

Queen's Park
16 January 1986

**MEMBERSHIP OF THE STANDING COMMITTEE ON
PROCEDURAL AFFAIRS AND
AGENCIES, BOARDS AND COMMISSIONS**

MICHAEL J. BREAUGH
Chairman

REMO MANCINI
Vice-Chairman

MAURICE BOSSY
ELIE W. MARTEL
BRUCE McCAFFREY
GILLES E. MORIN
BERNARD NEWMAN



NORMAN W. STERLING
RICHARD L. TRELEAVEN
JOHN M. TURNER
DAVID W. WARNER

A. SMIRLE FORSYTH
Clerk of the Committee

On Thursday, 28 November 1985, the Chairman of the Select Committee on Energy, Philip Andrewes, rose on a question of privilege concerning the premature release of draft material of the Select Committee. After listening to the comments of a number of members, the Speaker advised the House that he would reserve judgement on the matter. On the following day, Friday, 29 November 1985, the Speaker stated that such premature release had always been considered to be a breach of the privileges of the members constituting a contempt of the House and indicted that he would entertain a motion to refer the matter to a committee of the House. Subsequently, on motion by the member for Bellwoods, Ross McClellan, the matter was referred to the Standing Committee on Procedural Affairs and Agencies, Boards and Commissions.

On Thursday, 5 December 1985, the Vice-Chairman of the Select Committee on Energy, George Ashe, and the Clerk of the Select Committee on Energy, Franco Carrozza, appeared before the Committee. The Vice-Chairman of the Select Committee stated to the Committee that it was the feeling of all members of the Select Committee that a draft report before the Committee was not leaked or handed to a member of the media. Mr. Ashe stated that the Select Committee's report had not yet been completed. Mr. Ashe went on to say that it appeared that through the diligence of the press the story had been compiled after questioning of members of the Select Committee.

The Clerk of the Select Committee on Energy advised the Committee that a draft report was circulated to members of the Select Committee on 20 November 1985. Attached to the report was a memorandum from the Chairman of the Select Committee requesting that "great care be taken to ensure that this report remains confidential." The report was delivered by hand, with the instruction that it only be given to members of the committee or their assistants.

During questioning by the members of the Committee, the Vice-Chairman of the Select Committee stated "we definitely know which two people spoke to the press: one government member and one Conservative member." The Vice-Chairman stated further that "in all sincerity and honesty, I firmly believe they did not think they gave anything to the press. I suppose you could say in a substantive way they did not. But the press can talk to one member and get a

little and very definitely make a statement to another member. They put two and two together and created three stories in this case. I do not think it is probably anything worse than that. It has shown to the two members, as well as to all of us, that sometime even a little said is too much."

As a result of the evidence of the Vice-Chairman of the Select Committee, the Clerk of the Committee was instructed to write to the two members whose names had been raised by Mr. Ashe to provide them with an opportunity to respond to the comments made during the Committee's meeting. In responding to the letter of the Clerk of the Committee, both members stated that they did not believe that they had breached any privilege of the House.

After carefully reviewing the facts and evidence, your Committee is of the opinion that no breach of privilege occurred. Consequently, your Committee recommends that no further action be taken with respect to this matter.

However, your Committee does urge all members and staff involved with confidential committee discussions or documents to be more prudent when discussing such confidential matters with the media or other persons.

On Thursday, 7 November 1985, the member for Sault Ste. Marie, Karl Morin-Strom, rose on a question of privilege with respect to information contained in an article in The Toronto Star of the same date on the Interim Report of the Select Committee on Economic Affairs which was to be presented to the House later in the day. The Speaker found that the member for Sault Ste. Marie had established a prima facie case of privilege. On motion by Mr. Morin-Strom, the matter was referred to the Standing Committee on Procedural Affairs and Agencies, Boards and Commissions.

On Thursday, 5 December 1985, the member for Sault Ste. Marie, the Chairman of the Select Committee on Economic Affairs, David R. Cooke, and the Clerk of the Select Committee on Economic Affairs, Douglas Arnott, appeared before the Committee. The member for Sault Ste. Marie stated to the Committee that The Toronto Star article quoted extensively from the Interim Report of the Select Committee on Economic Affairs. This included a number of the report's recommendations and part of the preamble. Mr. Morin-Strom stated that the report was developed in camera and that the direct quotes from the body of the report could only have come from limited sources.

The Chairman of the Select Committee on Economic Affairs stated to the Committee that the report referred to in The Toronto Star article was either of the draft reports before the Select Committee on 23 or 29 October 1985. On 23 October 1985, at the conclusion of the Select Committee's deliberations, all members of the Committee were asked to and did turn in their draft reports. The only persons who had a draft following that meeting were the Chairman of the Select Committee, the Clerk of the Committee and the Researcher to the Committee.

On 29 October 1985, a draft report was distributed at a meeting of the Select Committee. All of the copies of the draft report were turned in at the conclusion of the Committee meeting. Mr. Cooke stated that he could not say whether any member of the Committee had taken a copy of the draft report out of the committee room at the lunch hour or another time. The Chairman stated that he had been assured by the Clerk of the Committee that the printers and the Office of the Clerk had taken all precautions to ensure that the confidentiality of the report was maintained. The Research Officer had assured

the Chairman that precautions had been taken in the Legislative Research Service to prevent any premature disclosure of the report or any part of the report.

The three witnesses were asked if they knew who leaked the contents of the report. Mr. Morin-Strom, Mr. Cooke and Mr. Arnott stated that they did not know who had leaked the report. The Chairman of the Select Committee went on to state that the disclosure of the contents of the Committee's report was, in his opinion, a deliberate action.

The precedents of this Assembly and of other Parliaments clearly indicate that it is a breach of privilege to disclose or publish all or part of a committee report, which has been prepared while a committee is meeting in camera, before the report has been presented to the House. This is based on the ancient custom of Parliament that "no act done at any committee should be divulged before the same be reported to the House". The reason for this is to ensure that members be the first to hear a committee's report and to hear it directly from the committee concerned, rather than read or hear an account, which may be inaccurate or prejudiced.

Your Committee is of the opinion that a breach of privilege did occur. However, it has not been possible for the Committee to identify the source of the leak. Although the Committee can clearly identify the persons who published the contents of the Select Committee's report, the Committee is of the opinion that it would be unjust to punish the persons who published the confidential information while the original source of the leak goes unidentified and unpunished.

In this case, your Committee recommends that the House take no further action with respect thereto.

Your Committee does wish to emphasize that the privileges of the House with respect to premature disclosure of committee reports should not be considered lightly or disregarded. Such privileges must be retained to provide reasonable protection for the House and its officers from obstruction or threats of

obstruction causing or likely to cause substantial interference with the performance of their functions.

The Committee is of the opinion that a further discussion of the premature disclosure of committee reports, documents or deliberations would benefit all members and others involved in the legislative process.

The basic function of standing and select committees has been to enable a small group of members to examine a matter, in many cases hearing evidence, and to report their findings and recommendations to the House. Central to this basic function is the ability of such committees to get facts and to base their conclusions on the facts. Any publication of in camera deliberations, or of papers, such as draft reports considered in private, will have a direct effect on the way the committees operate.

A leak, especially of a draft report or from an early stage of deliberations, could cause considerable damage to the process of seeking agreement or as much agreement as possible. Committees (and especially the Standing Committee on Procedural Affairs and Agencies, Boards and Commissions) still consider it important to seek to follow the traditional aim of seeking unanimity, or failing unanimity, broad agreement or consensus.

Leaks made for the purpose of deliberately influencing a committee's decisions at an early stage, could be very damaging. A draft report is not a final conclusion but rather the first step in a process of reaching conclusions. It might well contain passages designed to open up a discussion, which might be dropped or modified in light of other opinions. To leak and give publicity to such provisional or preliminary work, especially on politically sensitive matters, may well render compromise or concessions harder to make and final agreement harder to obtain. It is also important to note that the direct damage done by leaks is often worse if the leak is itself inaccurate, partial or misconceived.

If the leaking of committee deliberations or papers becomes a common practice, there is a very distinct danger that witnesses who give evidence in camera or persons who provide confidential papers may become more reluctant to do so. Further, leaks may also undermine the mutual trust which often exists between members on a committee.

In the British House of Commons it has been stated that the members of the committees are themselves the principal sources of leaks. There have been no cases in this century of committee staff or specialist advisors to committees being found to be the source of leaks.

One probable source of leaks is the inadvertent disclosure by a member. Some members will, quite naturally, discuss the work of their committee with other members, their own staff or caucus researchers or with others whose advice or opinions they seek. Some of these people may not have the appropriate respect for such information which they have been given in confidence, and published leaks may result. Inadvertent disclosure could also result from inadequate security of committee documents in members' offices.

A Select Committee on Privileges of the United Kingdom House of Commons has stated that the majority of leaks are the deliberate work of members of committees acting for political or personal reasons including the political desire to undermine a draft report, a wish to influence the decisions the committee will take, or a desire to maintain good and friendly relations with a member of the press.

One of the major difficulties confronting the House is determining the original source of the leak. It is a rare occasion when members or others will admit responsibility for leaking information. As a result, a general blame is shared by all associated with the committee. In such a case, no sanctions can be imposed on the offender(s).

There would be few leaks if there was no likelihood of publication. The press has argued that its function is to publish news and information about all matters of public interest, including the work of the committees of the House. However, one should not minimize the damage which can flow from the publication of confidential information. The difficulty in dealing with the issue of the press is that it may be argued that it is unjust to punish the person(s) who reports a leak while the original source goes unpunished. As well, there has been apparent reluctance in various Parliaments to impose any sanctions on the press.

The House has the right to punish any person who, by his conduct, may have offended the privileges of the House. The problem in this regard which confronts the House is that of finding suitable penalties for any such offence.

The only formal penalties which the House can impose on persons other than members are imprisonment for the remainder of the Session or reprimand or admonition at the bar of the House. The latter has not been done in Ontario since 1903. The House has no power to levy fines (although the Standing Committee on Procedural Affairs recommended this during the last Parliament, no action was taken by the House). With respect to members, the House can, in addition to the above, suspend or expel a member who has been found guilty of a breach of privilege.

With respect to the press, the same penalties can be imposed as with respect to persons. In the British House of Commons, committees on privilege have suggested that offending members of the press could be penalized by excluding them from the precincts of the House, thus depriving them of the facilities and rights they enjoy while reporting the work of the Legislature. It has been suggested that such action would require the approval of the House.

In general, the Parliament at Westminster and, indeed, our own legislature, has been reluctant to use its penal powers to stifle abuse of its privileges with respect to the premature disclosure of committee reports and other confidential material. Nonetheless, a point may be reached at which such conduct ceases to be merely abuse and becomes an improper obstruction of the function of the House. For such cases, however rare, the penal powers of the House should be preserved and the House must be prepared to exercise them in cases where a leak has caused, or is likely to cause, "substantial interference" with the functions of the House or a committee. There would be a danger of encouraging more leaks if the rules of privilege on this matter were discarded or relaxed in any way.

A recent report of the Select Committee of Privileges of the United Kingdom House of Commons noted three instances where leaks could be considered to be serious. These include (1) the publication of significant material improperly

acquired, such as stolen documents, or documents clearly marked as confidential which have been found by chance, or information obtained by payment or for other improper reward or by means of threats, (2) the leaking of clearly classified information, and (3) those instances where a member or other person has deliberately attempted to damage the work of a committee by premature press publication, or when such publication can be shown to have caused, or be likely to cause, substantial interference with a committee's work. Your Committee is of the opinion that these points should be used to consider related questions of privilege in the Ontario legislature.

As the Committee noted, the ultimate criterion in all such cases lies in the effect of the leak on the public interest. Leaks which simply cause annoyance or political or personal embarrassment should not be considered serious cases for the purposes of the rules of privilege. However, the test of "public interest" does encompass substantial interference with the effective working of a committee or the committee system or the functions of the House itself.

The United Kingdom Committee recommended that if a member is found to be responsible for a leak in one of the three categories, such member should be punished. The Committee suggested that the appropriate penalty in many cases would be the removal of the member from the committee concerned. The Committee suggested that a member of the press found to have violated the rules of privilege should be liable to an appropriate penalty. In this case, the penalty recommended is the suspension of the member, for a defined period, from the precincts (in London, the Lobby at the front door of the Chamber) and the suspension of such person's Press Gallery pass for the same defined period.

The Committee made certain recommendations to make members of committees aware of their responsibilities. The Committee recommended that:

1. all members, when they are appointed to a committee, be given a short statement of the rules of privilege as they apply to select committees.
2. documents, the leak of which might be particularly damaging to the committee, (and the envelopes containing them) should be stamped

with the words "IN CONFIDENCE - FOR USE OF COMMITTEE ONLY".

3. committees should regularly take steps to draw to the attention of their members those parts of their proceedings - both oral and written - which are particularly sensitive from the privilege point of view, such as draft reports, the leak of which could be considered to be serious. The Committee noted that this could be useful in relation to members' personal staff whose position and responsibilities in relation to committee papers are not always clear.

Your Committee recommends that the Clerk of the Assembly include in the booklet "Standing Committee Procedure" a short statement on the rules of privilege with respect to the premature disclosure of committee reports, documents or deliberations considered in private and that such booklet be given to each member when he or she is appointed to a standing or select committee. The clerk of each standing or select committee should ensure that each member of a committee is aware of the privileges surrounding premature disclosure of confidential committee materials.

Your Committee recommends that the Clerk of the Assembly prepare a statement on the rules of privilege with respect to the premature disclosure of committee reports, documents or deliberations and arrange for the distribution of such a statement to members' staff, staff of the Office of the Assembly and persons involved with the printing of committee documents.

Your Committee also recommends that the clerk of each standing and select committee ensure that each page of any confidential committee document, and the envelope containing the document, be stamped with the words "CONFIDENTIAL - FOR COMMITTEE USE ONLY".

Your Committee further recommends that the chairman of each standing and select committee regularly draw to the attention of the members of the committee those parts of the committee proceedings which are particularly sensitive, the leak of which could be considered to be serious.

Finally, your Committee recommends that the Speaker, the Chairman of the Standing Committee on Procedural Affairs and Agencies, Boards and Commissions and the Clerk of the Assembly meet with representatives of the Legislative Press Gallery to discuss the possibility of instituting "lock-ups" for the media immediately prior to the release of a committee's report. This device has been used successfully with respect to the Budget and other important matters being brought before the House by the Government. The Committee recommends that the use of "embargoes" also be discussed with the Legislative Press Gallery. This approach has been used without serious abuse by select committees of the House of Commons of the United Kingdom. The media representatives and others receiving the report in advance of presentation in the House would agree and be honour-bound not to release the report prior to the time stated on the report. Of course, any breach of confidence could be considered to be a serious offence and dealt with in an appropriate manner by the House.

ISBN 0-7729-1182-7

